

REMARKS

Applicant requests that this paper be entered into the record as being responsive to the Examiner's Office Action dated 01/18/2007 which was made final. Claims have been amended and a terminal disclaimer has been filed. Claims 2-7 and 9 have been canceled. Claims 1 and 8 are pending.

04-10-2007 Telephone Conference with Examiner Li.

Applicant's attorney wishes to thank the Examiner for the opportunity to discuss the pending application. The Examiner agreed that the filing of a terminal disclaimer would remove the rejection stated in the Office Action paragraph 2 which pertained to the pending claims.

Applicant's attorney discussed the use of the transition phrase "consisting essentially of" in claim 1 as a way to avoid the Jury et al. prior art reference. The Examiner responded that a new search would have to be performed. On this point, the discussion was inconclusive.

Terminal Disclaimer.

A terminal disclaimer is submitted to overcome the obviousness-type double patenting rejection of the pending claims. Although the transition phrase "consisting essentially of" in independent claims 1 and 8 is believed to be obviate the obviousness-type double patenting rejection in the opinion of Applicant's attorney, the terminal disclaimer is nonetheless submitted to facilitate allowance.

Applicant reserves the right to argue against an obviousness-type double patenting rejection in any later filed application.

Claims 1 and 8 rejected upon 35 USC 103.

In the Office Action at paragraph 3, claims 1, 3, 5, and 8 stand rejected over Jury et al. (US 6,262,175) in view of Marinelli (US 6,247,651).

The Examiner has limited his use of the Marinelli reference for teaching to make railroad ties according to the formula of the Jury reference.

Independent claims 1 and 8 have been amended to remove the Jury reference by changing the transition phrase from “comprising” to “consisting essentially of”.

The Examiner stated the Jury reference discloses a similar formula as in the pending claims. Jury discloses the combination of vulcanized rubber crumb, polyolefin, uncured rubber and a vinyl polymer (see Jury Abstract). The pending application does not teach or suggest the use of a vinyl polymer while Jury requires 2-30% (Jury Col 1, lines 43-45).

Specifically, Applicant teaches the use of a strength enhancing polymer selected from the group of ABS, urethane, neoprene and polyethylene. On the other hand, Jury only teaches the use of polyethylene as a polyolefin (Jury Col. 2, line 50). Jury also specifically excludes polyolefin from being considered as a vinyl polymer component (Jury Col. 4, lines 13-18).

Therefore, by amending the transition phrase in pending claims 1 and 8 to “consisting essentially of”, the vinyl polymer component of Jury can not be considered to be present in the pending application.

Since amended claims 1 and 8 have been narrowed rather than expanded by the use of the transition phrase “consisting essentially of”, Applicant believes that a new search is not required and that the pending claims are in condition for allowance.

CONCLUSION

Pending claims 1 and 8 are believed to be in a condition for allowance.

Respectfully submitted,

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Ralph D. Chabot, Reg. No. 39,133
Attorney for Applicant